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Indirect tax update

Week ending 4 October 2019

Summary

Welcome to this week's Indirect Tax Update.

This week's ITU looks at an Advocate General's opinion, a judgment from the Court of Justice and a judgment from the Upper Tribunal.

The Advocate General has also issued an opinion in the case of Herst which relates to the question of which supply, in a chain of transactions qualifies for exemption from VAT as an intra-community supply. Only one supply in a chain can benefit from that exemption from VAT so it is vital to ensure that the correct supply has the transport ascribed to it.

The Advocate General considers that the best way to determine that supply (the intra-community supply) is to establish which entity carries the risk of accidental loss during the transportation of the goods.

In the case of Cardpoint, the taxpayer provided services under a contract with a bank in relation to the operation of Automatic Teller Machines (ATM's). The taxpayer considered that its services were exempt from VAT under the 'financial services' provisions of the VAT Directive (Article 135). However, the tax authority considered that exemption did not apply and that the services were, thus, liable to VAT.

The judgment is not yet available in English but a rough translation from the French text appears to show that the Court of Justice agrees with the tax authority.

Finally, we look at a decision from the Upper Tribunal in relation to Eynsham Cricket Club.

The club constructed a new pavilion and considered that the construction should be zero-rated on the basis that it was to be used by a charity as a village hall or similarly for social or recreational purposes.

The cricket club was also a Community Amateur Sports Club (CASC) and the question for the Upper Tribunal was whether the club could be both a charity and a CASC.

Unfortunately for the club, the Tribunal ruled that s6 of the Charity Act 2011 precluded the club from being a charity and, as such, the construction of the pavilion did not qualify for zero-rating.

Court of Justice – Advocate General's Opinion – Case C-40/18 - Herst

VAT – exemption for intra-community supplies (Article 138 VAT Directive)

Herst is a supplier of fuel established in the Czech Republic. It purchased fuel from another business also established in the Czech Republic and paid Czech VAT which it reclaimed through its VAT return. However, the fuel was actually collected directly by Herst from a refinery in a different Member State. The Czech tax authority considered that, as the fuel was physically located outside the Czech Republic when it was supplied to Herst then there was no domestic supply in the Czech Republic but there was an exempt intra-community supply in the other Member State and Herst was not, therefore, entitled to reclaim the VAT charged.

Herst appealed and, ultimately, the Regional court in Prague referred the matter to the Court of Justice as it required help on the interpretation of the VAT Directive. The Advocate General (Julianne Kokott) has now issued her opinion which is not binding on the Court of Justice (CJEU) but gives a clear indication of the court's thinking.

The Advocate General refers to earlier case-law of the Court which sets out that only one supply in a chain of supplies can qualify as an intra-community supply – being a supply involving the transport of the goods from Member State 'A' to Member State 'B'. It is that supply and only that supply that qualifies for exemption from VAT. Any other supplies in the supply chain will, by default, therefore, be either a domestic supply in Member State 'A' or a domestic supply in Member State 'B'. The Directive defines a supply of goods as the transfer of the right to dispose of the goods as owner. This is not necessarily the same as the transfer of legal title under civil law. However for there to be a supply of goods in a VAT sense, there must be a transfer of the right to dispose of the goods as owner and it is the timing of that transfer that is crucial for determining which party transports the goods. Advocate General Kokott added a further factor into the mix in order to help determine which entity carries out the exempt intra-community supply. In her view, the person or entity that bears the risk of accidental loss of the goods during their transportation from Member State 'A' to Member State 'B' is the person that is making the intra-community supply.

In Herst's case it acquired the right to dispose of the fuel as owner when it put the fuel into its tankers at the refinery in Member State 'A'. It also assumed the risk of accidental loss of the fuel during its transportation to Member State 'B'. Accordingly, the supply of the fuel to Herst constituted a cross-border intra-community supply and, under Article 138, that intra-community supply was exempt from VAT and Herst was not, therefore, entitled to reclaim the VAT charged to it by its supplier.

Comment – Determining the place of supply of goods is a relatively straightforward exercise. However, determining which supply in a chain of supplies is the exempt intra-community supply is, as has been demonstrated in this case, fraught with difficulty. The Advocate General considers that the crucial factor in determining which supply qualifies as the intra-community supply is to assess which entity assumes the risk of accidental loss of the goods during the actual transport of the goods. She focuses on 'risk of loss' as, in her view, it is generally assumed by the person who has acquired ownership of the goods (or in a VAT sense, who has acquired the right to dispose of the goods as owner). If the full court agrees – the full court judgment should be released in 3 months or so – then businesses involved in cross-border supplies of goods will need to be able to identify which party assumes the risk of accidental loss going forward.

Whilst this case focuses on the determination of which party carries out the intra-community supply, it also helps to determine which party(ies) are making 'domestic' supplies in Member State 'A' or 'B' and whether VAT registration is required in those Member States.

Court of Justice – Judgment – Cardpoint

Whether the services relating to the operation of ATMs qualified for exemption

The VAT Directive (Article 135) provides an exemption from VAT in relation to 'transactions concerning payments'. According to the Court's case-law, this exemption is, however, only available if the transaction has the effect of changing the legal and financial relationship between two parties.

In the case of Cardpoint, it provided services under a contract with a bank to operate the bank's network of ATMs. This included operation and maintenance of the ATMs, replenishing them (with cash), the installation of computer hardware and software, send a withdrawal authorisation request to the bank that issued the card being used in the ATM, dispensing cash on receipt of an authorisation and registering the cash withdrawal transactions.

Cardpoint took the view that its services under the contract had the effect of changing the legal and financial relationship between the cardholder and the bank such that the service to the bank should qualify for VAT exemption. However, the Court of Justice disagreed. The service provided by Cardpoint was only to be regarded as a preliminary or administrative service which did not, in fact, alter the legal and financial relationship of the parties. Accordingly, Cardpoint's services were not exempt from VAT but were liable to VAT at the standard rate.

Unfortunately, this judgment is not available in English at present. The above is, therefore, based on an unofficial translation of the judgment from French. However, it seems to be in full agreement with the earlier opinion of the Advocate General which was released in May 2019.

Comment

This is another case relating to the VAT exemption for transactions involving payments (following earlier cases like Bookit).

The Court is quite clear that, to qualify for VAT exemption, a transaction involving payments must actually directly debit or credit the accounts concerned.

This was not done in this case – all that Cardpoint provided was a preliminary or administrative service which enabled the bank to make the required debits or credits.

It was the banks actions that changed the financial and legal relationship with it's customer not the actions undertaken by Cardpoint under its contract with the bank.

Upper Tribunal – Eynsham Cricket Club

Whether the construction of a new cricket pavilion qualified for zero-rating

The issue in this case was whether the construction of a new cricket pavilion was zero-rated. The club contended that it was intended to be used by a charity otherwise than in the course or furtherance of a business or, alternatively, as a village hall or similarly in providing social or recreational facilities for a local community.

The cricket club was a Community Amateur Sports Club (a CASC) and the case rested on whether, as a CASC, it also met the definition of 'charity' and whether it operated 'solely for charitable purposes' as defined by Schedule 6 to the Finance Act 2010. The First-tier Tribunal considered that the club met the definition of charity but, as the club was established for both charitable and non-charitable purposes, it did not qualify as a charity for VAT purposes. The club appealed to the Upper Tribunal.

The Upper Tribunal issued its judgment recently and also dismissed the club's appeal albeit for different reasons. The Tribunal found that section 6 of the Charities Act 2011 statutorily precludes a CASC from also being a charity or from having a charitable purpose. This provision was fatal to the club's case. As a CASC it could not meet the definition of charity in Finance Act 2010 and as a result, the new pavilion could not be said to be intended for use by a charity. Accordingly, the construction of the new pavilion did not qualify for zero-rating.

The club's appeal was dismissed.

Comment

There is now a clear statutory definition of charity contained in the Finance Act 2010. To qualify, an entity must meet certain statutory conditions in relation to registration (with the Charity Commissioners), jurisdiction and management and it must be established only for a charitable purpose.

For clubs that are registered as Community Amateur Sports Clubs (CASC's) the provisions of section 6 of the Charities Act 2011 means that even if the above conditions are met, the club cannot also be recognised as a charity or as having a charitable purpose.

This distinction is an important one and will have a major impact on the VAT position of such entities.

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